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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA, DIVISION 5

In re

ALPHA FACTORS, INC., dba Century 21
Alpha,

Debtor.

Case No. 08-54475 RLE

Chapter 11

NO HEARING REQUIRED

**EX PARTE APPLICATION FOR APPOINTMENT OF
SPECIAL COUNSEL FOR DEBTOR**

TO THE HONORABLE ROGER L. EFREMSKY, UNITED STATES
BANKRUPTCY JUDGE:

Debtor and debtor in possession Alpha Factors, Inc. dba Century 21 Alpha (the
“Debtor”) hereby applies for an order approving the employment of Ericksen, Arbuthnot,
Kilduff, Day & Lindstrom, Inc. as its special counsel (“Special Counsel”). Special
counsel will not be paid by the Debtor or estate but, rather, by business insurance
coverage, so the requested order for employment will pertain only to authorization to act
for the Debtor and will exclude entitlement to payment from the estate.

The Debtor respectfully represents as follows in support of this ex parte
application:

1 1. On August 15, 2008, the Debtor filed a Voluntary Petition under Chapter
2 11 with the Clerk of the above-entitled Court.

3 2. No Receiver or Trustee has been appointed, and the Debtor remains a
4 Debtor in Possession pursuant to 11 U.S.C. under Chapter 11 of title 11, United States
5 Code sections 1107 and 1108.

6 3. The Debtor is a party defendant in the case entitled VERA DALTON, an
7 individual and WILLIAM CORBIN, an individual, Plaintiffs, vs. CENTURY 21 ALPHA,
8 business form unknown, JOANIE FRANCIS, an individual, RICH ROBINSON, an
9 individual, DIANE RENEE LAMBERT and DOES 1 through 50, inclusive, and related
10 cross-actions, Santa Clara County Superior Court number 1 03 CV011268 (the
11 "Superior Court Action").

12 4. Special Counsel was retained by the California Insurance Guarantee
13 Association ("CIGA") to represent Century 21 Alpha Factors and its agents, Rich
14 Robinson and Joanie Francis, the additional defendants in the Superior Court Action.
15 Special Counsel took over the file from another law firm when Reliance Insurance
16 Company, the issuer of Debtor's coverage, went into liquidation. CIGA is not an
17 insurance company but is a state funded agency that assumes the obligations of certain
18 insurers should they fail. CIGA is funded by a surcharge charged by insurers and is
19 regulated by Insurance Code section 1063 et. seq. The statute limits liability for claims
20 made to \$500,000 regardless of the face limits of the insurance policies. Defense
21 costs, including attorneys' fees, do not reduce the \$500,000 of coverage provided by
22 CIGA to the Debtor or other defendants.

23 5. This Superior Court Action was filed by plaintiffs Vera Corbin and William
24 Dalton, purchasers of a home in Morgan Hill. Plaintiffs brought suit against the sellers
25 and the Debtor and other defendants for alleged non-disclosure of the fact that the
26 home sold was served by a failing septic system. The Transfer Disclosure Statement
27 provided at the time of sale indicated that the property was connected to a city sewer.
28

1 The defendants explained that the sellers filled out the TDS and told them that the
2 property was connected to the city sewer. The sellers (Lambert) claimed that they did
3 not know if it was on septic or sewer and that the real estate agents (our clients) told
4 them to check the box for sewer. The case went to trial, and the jury came back with a
5 verdict for plaintiffs for \$85,000.

6 6. The plaintiffs sought to recover their attorneys' fees against the sellers
7 and agents. The sellers sought to recover their attorneys' fees from the agents and
8 pass through all liability for the verdict and plaintiffs' attorneys' fees to the agents as
9 well. The court awarded plaintiffs \$50,000 for costs and attorneys' fees, recoverable
10 against both sellers and the agents. The sellers' request to pass through their own
11 liability for the plaintiffs verdict, and their own fees was denied. CIGA paid the \$85,000
12 verdict, and plaintiffs and sellers requested the trial court to clarify and/or reconsider) its
13 ruling. The court reconsidered its October 2005 ruling in December 2005 and revised it
14 slightly, to allow the sellers to obtain indemnity from the agents for the verdict (which
15 was paid) but not their own fees. The amount of the recoverable costs and fees for
16 plaintiffs (\$50,000) was unchanged.

17 7. Plaintiffs and the sellers both appealed the post trial rulings, seeking more
18 costs and fees. Special Counsel appealed the order to the extent it had included a
19 finding that the Debtor and other defendants were obligated to pay plaintiffs' attorneys
20 fees, since only buyer and seller were parties to the contract which contained the
21 attorneys fees clause and there was no other valid legal basis to award the fees against
22 the Debtor and other defendants. Special Counsel contested plaintiffs' and sellers'
23 appeals on their merits, but also pointed out that the trial court had been divested of its
24 jurisdiction before it rendered its December 2005 ruling because the plaintiffs and
25 sellers filed their appeal of the October ruling two days before the trial court ruled in
26 December. The appellate court reversed on that basis and remanded the matter to the
27 trial court.

1 8. The trial court re-entered its October 2005 ruling in April of 2008 then
2 plaintiffs and sellers moved for a new trial, again seeking more fees and costs. This
3 time the trial court reversed its prior two rulings, awarded plaintiffs all of their requested
4 fees (\$265,000) and also found the Debtor and other defendants liable for Lamberts
5 fees and costs. There has been no hearing on Lamberts costs yet, but they seek
6 \$135,000. The Debtor and other defendants wish to appeal, once again, and to
7 challenge any costs requested.

8 9. In selecting Special Counsel, Debtor made careful and diligent inquiry into
9 the qualifications and connections of Special Counsel. The attorneys of Special
10 Counsel who would perform legal services on Debtor's behalf are admitted to practice
11 before this Court. Debtor has found them to be qualified to represent Debtor in this
12 case and related matters by reason of their ability, integrity and professional
13 experience.

14 10. The Debtor has retained Special Counsel subject to the approval of this
15 Court. The partners and associates at Special Counsel charge a combined, blended
16 rate of \$150 per hour for services rendered.

17 11. To the best of my knowledge, Special Counsel does not hold or represent
18 any interest adverse to the Debtor or its estate.

19 12. To the best of my knowledge, none of the attorneys of Special Counsel
20 has any connections with the Debtor, Debtor's creditors, their respective attorneys and
21 accountants, or any other party in interest herein.

22 13. Special Counsel's Statement of Arrangements filed concurrently is
23 incorporated herein by reference.

24 WHEREFORE, the Debtor respectfully requests entry of an Order approving the
25 appointment of Special Counsel to represent Debtor in the performance of all legal
26 services which have been heretofore rendered and which may be necessary to render
27 during the pendency of these proceedings.

1 I, Edward V. Zimbrick as president of the Debtor herein, declare that the
2 foregoing is within my personal knowledge and that, if called upon as a witness, I could
3 and would competently testify thereto.

4 I declare under penalty of perjury that the foregoing is true and correct
5 and that this declaration was executed on October 16, 2008 at San Jose, California.

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7 /s/ Edward Zimbrick
Edward Zimbrick

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